No. 12244.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RUTH VENA JOHNSON, also known as RUTH BOYCE, GLADYS VENES, FRANK VENES, a minor, RUTH VENES, a minor, MARY JANE VENES, a minor, and GLADYS VENES, as Guardian *ad litem* for said minors,

Appellants,

vs.

GEORGE GARDNER, as Trustee in Bankruptcy for the Estate of RUTH VENA JOHNSON, also known as RUTH BOYCE, Bankrupt,

Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

Statement of Facts.

The bankrupt, Ruth Vena Johnson, also known as Ruth Boyce, was adjudicated a voluntary bankrupt on April 24, 1947. [Tr. of Rec. p. 37.] She was a resident of Los Angeles, California. She was not a member of the bar, but was a real estate broker and operator of a real estate school. [Tr. of Rec. p. 38.] The other defendants are her daughter, Gladys Venes, and her daughter's minor children. They were all residents of Scotch Plains, New Jersey.

On December 2, 1944, Ruth Vena Johnson, a bankrupt and proponent of this appeal, owned a piece of real prpoerty specifically set forth in the complaint and the decree, having acquired title to it from Lauren W. O'Dell and Grace L. O'Dell, which deed was recorded in Los Angeles County. [Tr. of Rec. pp. 39 and 40.] On April 15, 1944, the bankrupt, who was then a married woman, entered into a property settlement agreement with her husband, Walter G. Johnson, in contemplation of a divorce. In connection with such settlement she acquired a deed from him quitclaiming any interest he had in this real property. [Tr. of Rec. p. 40.] Prior to these occurrences, the bankrupt had become indebted to Harry V. Mooney of San Francisco in a sum in excess of $10,000.00. Suit thereon was impending, and the bankrupt proceeded to erect protecting barriers around her property.

On December 2, 1944, she transferred the real property in question to her daughter, Gladys Venes, and her daughter's minor children, without naming them, and recorded the transfer in the County Recorder's office. [Tr. of Rec. pp. 40 and 41.] The sole consideration for the transfer, recited in the so-called deed of gift, was love and affection. No consideration was paid nor given to the bankrupt defendant, Ruth Vena Johnson, for this property by the defendant, Gladys Venes, or her minor children. Thereafter on December 14, 1944, seeking to strengthen the protective barrier around her property, this fraudulent bankrupt made another deed purporting to be

a grant deed, conveying the same real property to her daughter, the defendant, Gladys Venes, alone, and took back from her daughter a general power of attorney permitting the bankrupt to manage, live in and collect the income from the real property in question for the bankrupt's own use and benefit. These two transfers, so hurriedly made, were made solely and for the purpose of hindering, delaying or defrauding Ruth Vena Johnson's creditors, and particularly Harry V. Mooney. [Tr. of Rec. pp. 41 and 42.] Mooney obtained a judgment in the Superior Court in San Francisco against the bankrupt after a contested trial, in excess of $10,000.00 principal, together with interest and costs. [Tr. of Rec. p. 40.] Thereafter on April 24, 1947, Ruth Vena Johnson filed her voluntary petition and was adjudged a bankrupt. [Tr. of Rec. p. 37.] At the time of her bankruptcy, she was indebted to numerous creditors in a sum approximating $58,000.00, and the assets in the hands of George Gardner, her duly elected, qualified and acting Trustee in Bankruptcy, were and are grossly insufficient to pay her liabilities in full. [Tr. of Rec. p. 42.] The bankrupt also concealed her other property which might have been made available to satisfy the Mooney judgment, either by carrying it concealed on her person, or keeping title to it in the name of a corporation. She never intended to pay the Mooney judgment. [Tr. of Rec. p. 42.]

During the period between the fraudulent transfer and the discovery of it by the Trustee and the trial of this action, the bankrupt collected and used the income from

the property herself, partly for its maintenance, and partly for her own use and benefit. After the trial of this action, brought by George Gardner, Trustee in Bankruptcy, to avoid this fraudulent conveyance before the United States District Court for the Southern District of California, Central Division, Honorable William C. Mathes, United States District Judge, sitting in equity proceedings without a jury, unhesitatingly found that the conduct of the bankrupt was fraudulent; that the transfers were void, and rendered a decree setting the transfers aside. He did not render a decree compelling the bankrupt to account and pay over to the Trustee the rents which she had collected during the period of the fraudulent transfers.

Questions Involved.

The sole question before this court, raised by the appellee here, is whether or not the bankrupt's demand for a jury trial, made on the morning the case was called for trial should have been granted, and whether or not the court invaded her constitutional rights in declining to impanel a jury and try this fraudulent conveyance case before a jury. We shall discuss this question at length in our argument, points and authorities. There are no questions raised here as to the sufficiency of the evidence to justify Judge Mathes' Findings of Fact and Conclusions of Law and Decree.

ARGUMENT, POINTS AND AUTHORITIES.

At the onset of this part of our brief, we wish to call the court's attention to the brazen attempt on the part of this bankrupt to mislead and deceive this court as she has misled and deceived so many others. Her fraudulent conduct did not end with her transferring this property to her daughter and her daughter's minor children back in New Jersey, to defraud Harry V. Mooney, a creditor, nor with her passing a lot of worthless checks for which she was even then serving a term in jail at the time of the trial of this action (see *People v. Boyce,* 87 Cal. App. 2d 828), but she has carried her dishonest and fraudulent conduct up into this court on this appeal.

At the very onset of her brief, at page 2, beginning at line 10, we find the following statements:

> "The appellant was represented *by court appointed counsel* who had not demanded a jury. The appellant, herself, brought into court from jail, had demanded a jury. The appellant at the questioning of the court, released Mr. Turnbull as her attorney and acted as her own attorney in the case. She demanded a trial by jury of the issue of fact as to whether the transfer of the property to her daughter was bona fide. The court relieved Mr. Turnbull of representation of the defendant." (Italics ours.)

The first sentence of that statement is absolutely false and untrue, and Ruth Vena Johnson knows that such statement is false and untrue. We are certain Mr. Lavine, an officer of this court for many years, would not be guilty of making such a bald-faced, untrue statement to the second highest court in the United States unless those facts were given him by the bankrupt, Ruth Vena John-

son, as Mr. Lavine had nothing to do with this case until several months after the trial. In any event, the statement that she was represented by court appointed counsel is one which we must brand as absolutely false and untrue, and our challenge to this statement will be borne out by the record.

The amended complaint on which the case was tried is set forth in the record at pages 2 to 10. The answer of the defendants to the amended complaint is found commencing at page 11 and is verified by Ruth Vena Johnson at page 15 of the transcript. The attorney for all of the defendants was Rupert B. Turnbull. [Tr. of Rec. p. 14.] Nowhere in the record does there appear any indication that Mr. Turnbull, one of the best known bankruptcy practitioners in the United States, was appointed by the court to represent this defendant, or any of the defendants, and that, for the very good reason that no such appointment was made. Mr. Turnbull was engaged by Mrs. Johnson to file the answer, took care of all of the pre-trial steps in this case, and appeared in court the morning the case was finally called for trial. Mrs. Johnson, in open court, proceeded to fire Mr. Turnbull out of the case, both on behalf of herself and her daughter. [Tr. of Rec. p. 21.] This was done in open court, and Mr. Turnbull, in order to protect himself, had asked the court to approve his discharge from the case by this fraudulent bankrupt. She purported to act on behalf of her daughter by virtue of the power of attorney which she held from her daughter, in discharging Mr. Turnbull as her daughter's attorney. [Tr. of Rec. p. 21, line 2, *et seq.*] She claimed that her daughter had written her that she did not want Mr. Turnbull to represent her under any conditions. [Tr. of Rec. p. 22.]

Nowhere in the colloquy between the court and Mrs. Johnson, at the threshold of the trial, is there one solitary word to indicate that the court had appointed counsel for Mrs. Johnson and Gladys Venes in this civil action, or that Mr. Turnbull was so appointed. Were such an appointment made, the writer of this brief would have known it, familiar with the record as he is, and would not, as an officer of this court of long standing, have the temerity to make an unequivocal challenge to the statement contained in Mrs. Johnson's opening brief that she was represented by "court appointed" counsel.

The Demand for a Jury Trial.

The record discloses that this fraudulent bankrupt verified the answer on behalf of all of the defendants, acting through Rupert B. Turnbull, her attorney. She did not at the time of filing her answer, or within ten (10) days thereafter, serve and file a demand for a jury trial, as required under Rule 38-b of the Federal Rules of Civil Procedure, which requires as follows:

> "Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than ten days after the service of the last pleading directed to such issues. Such demand may be endorsed upon a pleading of the parties."

Subdivision "d" of Rule 38 provides that failure to serve such a demand under the rule and file it as required by Rule 5-d constitutes a waiver by the party of trial by jury.

After delaying the trial of this case from February 10, 1948, until it was ultimately brought to trial on November 23, 1948, the bankrupt was brought over from jail where she was serving her time and attempted to bemuddle the controversy still further by first discharging her attorney, Rupert B. Turnbull, both on her own behalf, and on behalf of her daughter, and then demanding a jury trial. The jury panel happened to be in attendance at the time, and upon this demand being sprung upon counsel, for the first time, on the morning of the trial, naturally the writer objected on the ground that the action was one in equity to set aside and avoid a fraudulent conveyance, and to compel an accounting, and was not properly triable before a jury as a matter of right. [Tr. of Rec. p. 17.]

Mr. Turnbull who had appeared at the opening of the trial stated that he did not demand a jury trial under Rule 38, and that it was not intended to be demanded at the time when he was counsel for Mrs. Johnson. [Tr. of Rec. p. 19.] Judge Mathes thereupon declined to impanel a jury, and Mrs. Johnson, having discharged her attorney, employed by herself and her daughter, proceeded to try the case herself, using her superficial knowledge of the law acquired as the operator of a real estate school and as a real estate broker, to defend against this fraudulent transfer and all of the implications connected therewith. She succeeded in prolonging the disposition of this case from November 23, 1948, when the trial began, until February 10, 1949, when Judge Mathes signed the Find-

ings of Fact and Conclusions of Law and Judgment, after the bankrupt, acting on behalf of herself and the other defendants, had filed a series of scurrilous and defamatory objections and answers to the proposed Findings of Fact and Conclusions of Law, beginning at page 24 of the Transcript, and ending at page 35 thereof.

After the judgment was entered, she again went into action and engaged Hiram E. Casey to serve and file a Notice of Appeal, and then apparently discharged him, for what reason we know not, and persuaded Morris Lavine to take over from there on. She filed an affidavit for leave to appeal to this court *in forma pauperis,* declaring that she was a pauper, and leave was granted to her to proceed *in forma pauperis* under date of April 13, 1949. [Tr. of Rec. pp. 53 and 54.] Nowhere is there any contention made that the dummy transferee, Gladys Venes, or any of the other defendants are paupers. No order was made authorizing these New Jersey defendants to appeal to this court *in forma pauperis,* and none of them have posted a bond for costs as required in Rule 73 of the Federal Rules of Civil Procedure. No such bond has been filed by any of these defendants, and we believe that this court would be justified in dismissing the appeal in so far as the other defendants are concerned in conformity with Rule 73-a of the Federal Rules of Civil Procedure. We do not believe that the estate of a bankrupt should be subjected, by an irresponsible and fraudulent bankrupt, to the expenses and costs of an appeal taken by such irresponsible and fraudulent individual, who

claims on the one hand to have no interest whatsoever in the property, but on the other hand reserves the right to appeal from a judgment which rendered no relief against her whatsoever, on behalf, not only of herself, but on behalf of her dummy transferees.

We would, therefore, suggest to the court the advisability of seriously considering the dismissal of the appeal in so far as the defendants other than Ruth Vena Johnson are concerned by reason of their failure to pay any of the costs here or to post a cost bond.

Were the Defendants Herein Deprived of Any Constitutional Right by Reason of Their Not Being Accorded a Jury Trial in Equity Proceedings?

In the case at bar, the Trustee brought this action under the provisions of Section 70-e of the National Bankruptcy Act to avoid a fraudulent conveyance of the real property situated in the Southern District of California, jurisdiction of which was expressly vested in the District Court under the provisions of Section 70-e of the National Bankruptcy Act. (11 U. S. C. A., Section 110-e.) The bankrupt was joined as a party defendant to compel her to account to the Trustee for rents collected by her and disbursed and appropriated to her own use during the period of the fraudulent conveyance. The relief sought was of an equitable nature throughout. The District Court was asked to cancel the transfer and to vest title to the real property in the Trustee.

In *Brainerd v. Cohn*, 8 F. 2d 13, a leading fraudulent conveyance case in this circuit, this court said:

> "To apply the rule of those decisions to the present complaint: It is true the Trustee seeks a money judgment, but he also asks that certain transfers made

by the bankrupt in carrying out a conspiracy to defraud creditors may be set aside, and for an accounting with respect to quantities of personal property taken by defendants, and which has been mixed and confused beyond possible identification with the property of defendants, and for an injunction *pendente lite* against threatened removal or disposition of certain property, part of which belongs to Cohn, but which has been confused with that taken, and for such further relief as he may be entitled to. Relief against such a situation calls for the exercise of the flexible jurisdiction of equity, to the end that the wrongdoers shall not profit by their wrongs and that innocent creditors shall not suffer by them."

In *Barceloux v. Buffum,* 289 U. S. 227, another fraudulent conveyance case appealed from this circuit, after reviewing the facts and machinations indulged in by the bankrupt and the fraudulent transferees, the Supreme Court, speaking through Justice Cardozo, said:

"* * * This being so, the suit in its inception was properly framed as one for money relief, the value of the shares at the time of the foreclosure of the pledge. There was no objection at any stage of the controversy that the case was triable by a jury. *Schoenthal v. Irving Trust Co.,* 287 U. S. 92; *United States v. Bitter Root Development Co.,* 200 U. S. 451.

"* * * In saying this we do not intimate that the objection would have prevailed, if seasonably urged. There were entanglements that may have called for discovery and accounting, at least in possible contingencies. The point will not be labored, for at the trial the defendant did not argue to the contrary, (citing cases) and does not even now. By common consent the suit was tried as one in equity, the fraudulent grantee being held to account as a

trustee *ex maleficio* for the value of the shares which it had fraudulently acquired and then conveyed to someone else. *United States v. Dunn,* 268 U. S. 121; *Independent Coal & Coke Co. v. United States,* 274 U. S. 640; *Newton v. Porter,* 69 N. Y. 133; *Hamilton National Bank v. Halsted,* 134 N. Y. 520. A like recovery would have been permitted if the suit had been at law."

In *Morris v. Neumann,* 293 Fed. 974, the Circuit Court of Appeals for the Eighth Circuit reversed a judgment for money obtained by a trustee in bankruptcy based on a fraudulent foreclosure of a chattel mortgage. The decree of foreclosure was a collusive one. The trustee sued at law and recovered judgment against the fraudulent transferee in the sum of $5,229.49. On appeal the Court of Appeals for the Eighth Circuit reversed this judgment and remanded it back for the sole reason that it involved the impeachment of a collusive judgment of foreclosure rendered in the courts of the State of New Mexico and stated:

"The judgment is assailed because a part of it is alleged to be tainted by fraud and collusion, resulting in imposition upon the trial court in the determination of a matter within its jurisdiction to hear and decide upon the issues framed. Defendant in error's right of action is based upon this contention. Relief of this nature cannot be accorded by submission to a jury in an action at law. As an essential preliminary to recovery, the judgment of the state court must, in substance, be reopened for vacation or modification. The administration of estates in bankruptcy, as outlined in the act, manifests no purpose of departure from the distinction established between proceedings in equity and at law. Nothing can be more

essential to the preservation of stability in our jurisprudence than a proper regard for the integrity of the decisions of the courts upon matters clearly within their jurisdiction * * *. Such a direct suit involving such impeachment of this judgment may undoubtedly be brought by the trustee in bankruptcy, but the jurisdiction is necessarily in equity. * * *.

"* * * It follows from what has been said that the judgment must be reversed, and the cause remanded, because, while a potential cause of action has been stated, the jurisdiction of the court below at law failed, and the judgment rendered cannot be sustained. Upon the equity side in the District Court such proceedings may be had, and such decree rendered, as the rules and practice in equity may permit."

The Seventh Amendment to the Constitution of the United States guarantees the right to trial by jury in suits at common law where the value in controversy shall exceed $20.00. It does not guarantee the right to trial by jury in actions in equity in any event.

In *Trans-Pacific Corporation v. Goggin,* 166 F. 2d 1021, this court in a *per curiam* opinion affirmed a judgment of the District Court for the Southern District of California, reported in 76 Fed. Supp. 623, in which counsel for the defendant raised the question that four bankrupt corporations which had filed under Chapter XI proceedings, proposing a plan of arrangement, could when their plan of arrangement failed, demand a trial by jury on the question of insolvency and the commission of an act of bankruptcy before an adjudication could be entered against them.

In that case Mr. Lavine raised the question as raised here: That these corporations' rights under the Seventh

Amendment had been violated. The District Court held otherwise, and this court affirmed its judgment without opinion.

In the case at bar the relief sought throughout was equitable relief. Title to the property in question stood on the public records in the name of Gladys Venes, a fraudulent transferee. At common law prior to the enactment of the statute of 13th Elizabeth, a debtor had a right to do as he pleased with his property, and at common law his creditors were powerless to circumvent it. Actions to avoid fraudulent conveyances of property—particularly real property—have always been treated and regarded, both in this country and in England, as equitable actions rather than actions at common law. We do not know what kind of a common law action could possibly be brought to avoid a conveyance of real property regular on its face and duly recorded.

As was said in Glenn on Fraudulent Conveyances, Section 60, at page 91:

> "It has also been suggested that the equity courts could have worked out a doctrine of the same sort in behalf of the creditor. The writer has never doubted that; indeed, instances may be found where equitable relief was given in this sort of case long before the time of Elizabeth. In the following pages it will be shown, the writer hopes, that the contributions of equity to this subject have gone far beyond the statutes, their words, and even, perhaps, their purposes. But there were good reasons at the time for the mercantile public not entrusting the situation to the court of chancery as it was constituted, and as it

was working at that particular period of history. At any rate, it was from Parliament that relief was sought and the relief came in the shape of the Statute of Fraudulent Conveyances."

In a case of an equitable nature, if the court in its discretion decides to invoke the aid of a jury, it may do so, but the jury's verdict is only advisory and does not bind the court. There is no statute requiring a Federal Court to conform to the State practice in equity proceedings, and the defendant in a suit to quiet title in a Federal Court is not entitled to demand a jury trial, although it may be provided for by a State statute. *Van Deventer v. Lott, et al.,* 180 Fed. 378. Equity courts may decide both facts and law, but they may, if they see fit, refer doubtful questions of fact to a jury. *Garsed v. Beall,* 92 U. S. 684; *Fitton v. Phoenix Assurance Company,* 23 Fed. 3.

Both under the former and present rules to send an issue to a jury is within the discretion of the court to do or refuse.

Flagg v. Mann, 2 Summ. 406, Fed. Cas. No. 4847;
United States v. Samperyac, Hempst., 118 Fed. Cas. No. 16,216-a, affirmed 7 Pet. 222;
Wilson v. Riddell, 123 U. S. 608.

An application for a trial by jury is to be determined in the discretion of the court, and if it appears that the questions involved can be determined more properly by a chancellor, the application for a jury may be refused. *Keyes v. Pueblo Smelting and Refining Company,* 31 Fed. 560. Submitting issues to a jury in an advisory capacity is a matter of discretion of the court. *Federal Reserve Bank of San Francisco v. Idaho Grimm Alfalfa Seed*

Growers Association, 8 F. 2d 92; certiorari denied, 270 U. S. 646. Neither party to a suit in equity brought in a Federal Court has an absolute right to have the question of fact arising in the courts passed on by a jury. *Herdsman v. Lewis,* 9 Fed. 853.

Conclusion.

We believe that this is the first time a litigant has pretended to seriously contend that an equitable proceeding carries with it a constitutional right to a trial by jury, or a right to trial by jury in any event, in the absence of an express statute permitting it such as Section 19-a of the Bankruptcy Act which expressly provides for the right for trial by jury of an involuntary bankrupt on the issue of insolvency and the commission of an act of bankruptcy.

In the writer's brief in resistance to the petition for Writ of Certiorari in *Trans-Pacific Corp. v. Goggin,* 166 F. 2d 1021, heretofore cited, filed in the Supreme Court of the United States, the Court of Appeals for the Eighth Circuit in *Hirshfield v. Bryant,* 14 F. 2d 931, was cited as follows:

> "It is well settled that this provision of the Constitution does not apply to cases of admiralty or equity jurisdiction. *Waring v. Clarke,* 5 How. 441; *Webster v. Red,* 11 How. 437; *Shields v. Thomas,* 18 How. 253. It is equally well settled that proceedings in bankruptcy are of equitable cognizance, and therefore the provisions of the Seventh Amendment are not applicable thereto. Thus, in *Barton v. Barbour,* 104 U. S. 126, it is said:
>
> " 'The argument is much pressed that, by leaving all questions relating to the liability of receivers in the hands of the court appointing him, persons having

claims against the insolvent corporation or the receiver will be deprived of a trial by jury. This, it is said, is depriving a party of a constitutional right. * * * But those who use this argument lose sight of the fundamental principle that the right of a trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction * * * So, in cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus a claim of debt or damages against the bankrupt is investigated by chancery methods.' "

The Supreme Court of the United States denied certiorari in the case of *Trans-Pacific Corp. v. Goggin.*

We respectfully submit that this bankrupt who, incidentally, defied her creditors, her trustee in bankruptcy, and indulged, *in propria persona,* in conduct which would not be tolerated by any court on the part of an attorney, and who has even attempted to deceive this court by making it appear in her opening brief that she is a poor, unfortunate pauper after having stripped herself of her property and having put it safely in the name of her daughter living across the continent, and when brought to brook, now states she was represented by court appointed counsel who neglected her defense, should be given short shrift.

We respectfully submit that this appeal, in so far as it includes the defendant, Gladys Venes and her minor children, should be dismissed for the reason that they have

made no showing that they were paupers; have paid no fees, and have posted no cost bond; and that in so far as this appealing bankrupt is concerned, no judgment was rendered against her toward which she can assert a valid or legitimate grievance; and that the judgment should be affirmed. The only grievance that Ruth Vena Johnson can, according to her warped way of thinking assert, is that her Trustee in Bankruptcy, by the decree in this case, has taken away from her property which she thought she had safely placed in her daughter's name for her own use and benefit, and has deprived her of its future fruits. Of course, such a contention would be unconscionable in the eyes of a court of equity, but that is the only possible grievance that Mrs. Johnson can assert.

We respectfully submit that the judgment of the District Court should be affirmed.

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